



MATTHEW P. DENN  
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE  
820 NORTH FRENCH STREET  
WILMINGTON, DELAWARE 19801

PHONE (302) 577-8400  
FAX (302) 577-2610

December 5, 2018

Dear Law Enforcement Colleagues:

Because of incidents that have been reported in recent days of activity by a racist organization, the Department of Justice is reissuing the following guidance first issued in November 2016 for Delaware law enforcement the Delaware criminal statutes applicable to such conduct, in the hope that such conduct can be deterred here in Delaware. While this memo discusses terroristic threatening and disorderly conduct as likely charges that may form the basis of a hate crime involving speech, law enforcement should consider adding hate crime to any criminal charge when the elements in Title 11, Section 1304 of the Delaware Code are present regarding selection of a victim. Courts have ruled these are fact-specific determinations. The Office of Civil Rights and Public Trust is available to address any questions concerning whether the charge is appropriate under the facts.

### **Terroristic Threatening**

Statements that involve actual threats of violence against other persons are relatively easy to analyze under Delaware state law, and are virtually always illegal. Under Title 11, Section 621 of the Delaware Code, a person is guilty of terroristic threatening when that person threatens to commit any crime likely to result in death or in serious injury to person or property. The defendant must intend to threaten the victim,<sup>1</sup> but need not intend to actually carry out the threat.<sup>2</sup> ***If a person explicitly threatens death or serious injury against another person with the intent to threaten that person – even if the defendant doesn't actually intend to cause that harm – terroristic threatening charges are appropriate.***

### **Disorderly Conduct**

Statements that do not involve explicit threats may also violate Delaware's criminal statutes as disorderly conduct, but they require careful analysis. Under Title 11, Section 1301 of the Delaware Code, a person is guilty of disorderly conduct "when the person intentionally causes public inconvenience, annoyance or alarm to any other

---

<sup>1</sup> Andrews v. State, 930 A.2d 846, 853 (Del. 2007).

<sup>2</sup> Lowther v. State, 104 A.3d 840, 844 (Del. 2014).

person, or creates a risk thereof by...making an unreasonable noise or an offensively coarse utterance, gesture or display, or addressing abusive language to any person present....”

This disorderly conduct provision of the Delaware Code has been narrowly interpreted by the courts so that it comports with the First Amendment free speech rights of Delawareans. Delaware’s disorderly conduct statute may only be used to punish “fighting words” – words which by their very utterance inflict injury or tend to incite an immediate breach of the peace.<sup>3</sup> Fighting words are “those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction.”<sup>4</sup> Depending upon the facts of a particular case, the use of a single epithet may satisfy the requirements of Delaware’s disorderly conduct statute.<sup>5</sup>

There are a number of cases in other states which stand for the proposition that the use of racial epithets towards specific targets constitutes fighting words, and therefore can be punished as disorderly conduct if it otherwise meets the requirements of the statute.<sup>6</sup> However, the case law is very fact-specific – the Vermont Supreme Court recently ruled that a disorderly conduct conviction of a person who used the same language found to support a conviction in Delaware violated the First Amendment.<sup>7</sup> There is some case law from other states suggesting that the more generalized use of racial epithets which are not targeted at specific persons does not constitute “fighting words” which can be punished as disorderly conduct.<sup>8</sup>

Using the Delaware case law and case law from other states interpreting similar language as guidelines, DOJ’s interpretation is that ***it is permissible for law enforcement agencies to charge a person with disorderly conduct, even in the absence of an explicit threat, if that person specifically directs an abusive epithet, inherently likely to provoke a violent reaction, at an identifiable victim with the intent of annoying or alarming that victim.*** The questions of whether a particular statement constitutes an abusive epithet, and whether it is likely to provoke a violent reaction, is one that would ultimately be determined by a court and/or jury, with the guideline being that the statement should be one that, when addressed to the ordinary citizen, is inherently likely to provoke a violent reaction. To the extent that there is any actual conduct that accompanies the speech in

---

<sup>3</sup> Johnson v. Campbell, 332 F.3d 199, 212 (3d Cir. 2003).

<sup>4</sup> State v. White, 1989 WL 25818, at \* 2 (Del. Super. Ct. Mar. 7, 1989).

<sup>5</sup> Deeds v. State, 2007 WL 646203 (Del. Mar. 5, 2007).

<sup>6</sup> City of Billings v. Nelson, 322 P.3d 1039, 1045 (Mont. 2014) (“Racial slurs, including ‘spic,’ can be considered fighting words” in disorderly conduct prosecution); In re Spivey, 480 S.E. 2d 689, 699 (N.C. 1997) (use of racial epithet not protected by First Amendment); In re John M., 36 P.3d 772, 776 (Ariz. Ct. App. 2001) (use of racial epithet deemed hate speech).

<sup>7</sup> State v. Tracy, 130 A.3d 196 (Vt. 2015).

<sup>8</sup> People v. Barton, 659 N.W. 2d 654, 657 (Mich. App. 2002); State v. Machholz, 574 N.W. 2d 415, 422 (Minn. 1998).

question, e.g. if the speech is delivered in a physically menacing fashion, this may also be considered in determining whether the incident constitutes disorderly conduct.

**Hate Crime Statute**

Hate crimes are not a separate category of offenses in Delaware law, but Delaware does have a statute that imposes a longer sentence for an act that would otherwise be a crime under state law if that crime meets certain 'hate crime' criteria.

***If a defendant engages in either terroristic threatening or disorderly conduct (or any other crime), and the defendant selected his victim because of the victim's race, religion, color, disability, sexual orientation, gender identity, national origin or ancestry, then the crime is a hate crime under Delaware law, should be charged as such, and involves an enhanced sentence under Title 11, Section 1304 of the Delaware Code.***

If your agency has a question regarding this issue it should contact Sonia Augusthy, director of the Office of Civil Rights and Public Trust, at 302-577-8400.

Sincerely,

A handwritten signature in black ink, appearing to read 'Matthew Denn', with a stylized flourish at the end.

Matthew Denn  
Attorney General